

IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

ARTHUR IRVINE SMITH,

*Appellant,*

*vs.*

THE JAMES IRVINE FOUNDATION,  
a corporation, et al.,

*Appellees.*

Appeal From the United States District Court  
Central District of California

BRIEF FOR APPELLEES

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Gloria Wood Irvine and Security  
Pacific National Bank, as Execu-  
tors and Trustees of the Estate  
of Myford Irvine, Deceased.



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No. 22607

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## BRIEF FOR APPELLEES

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### JURISDICTIONAL STATEMENT

This is an appeal from a judgment rendered by the United States District Court for the Central District of California. The court's jurisdiction was invoked under 28 U.S.C. Sect. 1332 and is based upon diversity of citizenship. Plaintiff is a citizen of the State of Virginia, and all defendants for purposes of federal court jurisdiction are citizens of the State of California (R. 139).

### STATEMENT OF THE CASE

Plaintiff and appellant Athalie Irvine Smith originally filed this action against a number of defendants not including defendants and appellees Gloria Wood Irvine

and Security Pacific National Bank (formerly Security First National Bank) as Executors and Trustees of the Estate of Myford Irvine, Deceased. They were brought into the action upon motion of The James Irvine Foundation. We will refer to the interests of these defendants as the "Myford Irvine interests". To be perfectly clear, it should be mentioned that defendant Linda Irvine Gaede, a daughter of Myford Irvine, also comes within the general term the "Myford Irvine interests", but she is separately represented and not included in the term the "Myford Irvine interests" as used herein.

The District Court handed down its decision and judgment was duly entered in favor of all defendants. Plaintiff appeals. In view of the extensive briefing which will be done by other defendants, the Myford Irvine interests will make this brief indeed "brief". Discussion will be confined only to points most immediately connected with the Myford Irvine interests. Reference will be made only briefly to applicable case law, as it is believed a full and complete response to authorities cited by plaintiff will be made by other defendants.

Although it probably would be economically advantageous to the Myford Irvine interests for plaintiff to prevail, which would result in The Irvine Company stock being distributed to heirs of James Irvine, these defendants are convinced the contentions of plaintiff are not supported by the evidence and the findings of fact of the court below are not only not "clearly erroneous" but are indeed correct.

Plaintiff contends the trust created by the Indenture of Trust executed on February 24, 1937, (Exhibit A-1) was illegal and void for a number of reasons, set forth at pages 3 to 6 of her brief. They include, in general, assertions that James Irvine, as trustor, had no intent to divest himself of title to or control of the pertinent shares

of The Irvine Company stock; never intended title to that stock to pass to the Foundation; there was no effective delivery of the stock or the Indenture of Trust; and James Irvine died intestate as to those shares.

Plaintiff presents in support of these contentions little more than argument that a number of basic findings of fact by the District Court are wrong. She refers, *inter alia*, to these findings at pages 21 through 26 of her brief. In general, they are findings that there is no evidence James Irvine had possession of the Indenture of Trust after its execution; it was not found in his safe deposit box after his death; the Indenture of Trust following its execution was delivered to the Foundation and in its possession thereafter; the certificates of stock were endorsed in blank and delivered to the Foundation; and plaintiff, in general, failed to establish the non-delivery of the certificates of stock involved.

The contention that these findings are clearly erroneous is basically presented in two arguments, commencing at page 83 and page 98 of appellant's brief. It is urged that evidence of exercise of acts of ownership and dominion by James Irvine during his lifetime coupled with absence of activity on the part of the Foundation established non-delivery of The Irvine Company stock to the Foundation during James Irvine's lifetime.

## ARGUMENT

### I

#### FINDINGS OF FACT MUST NOT BE SET ASIDE UNLESS "CLEARLY ERRONEOUS"

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the oppor-

tunity of the trial court to judge of the credibility of the witnesses.”

*Federal Rules of Civil Procedure*, Rule 52(a).

Findings must be sustained by the appellate court if supported by substantial evidence and if, from the whole record, the appellate court is not left with the *definite firm conviction* that a mistake has been committed.

*United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948);

*United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 94 L.Ed. 150, 70 S.Ct. 177 (1949);

*California Airmotive Corp. v. Bass*, 354 F.2d 453 (9th Cir. 1965).

## II

**THE FINDINGS OF FACT OF WHICH PLAINTIFF COMPLAINS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE NOT “CLEARLY ERRONEOUS”. IF PLAINTIFF’S ARGUMENT IS TO BE ACCEPTED, THE CREDIBLE TESTIMONY OF A NUMBER OF REPUTABLE WITNESSES MUST BE COMPLETELY DISBELIEVED**

Loyall McLaren, at times pertinent to this matter a senior partner in the accounting firm of Haskins & Sells, testified that James Irvine confirmed to him that Mr. Irvine had executed the Indenture of Trust and delivered it to the Foundation in the person of Myford Irvine and Miss Price as its officers (Rep. Tr. pp. 54-55).

Robert Gerdes, president of Pacific Gas & Electric Company and another highly respected California citizen, testified that as the attorney who prepared Mr. Irvine’s will, he had a number of discussions with Mr.



Irvine, who told him he had executed and delivered the Indenture of Trust and, in general, that he intended to have created a valid trust involving a majority of the outstanding shares of stock of The Irvine Company (Rep. Tr. pp. 1816-1817).

Kent Sawyer, a well-known San Francisco lawyer identified legal opinion letters which he had rendered to Mr. Irvine at the latter's request concerning the validity of the trust created by Mr. Irvine in 1937 to which he obviously contemplated making an addition in 1946 (Exh. A-56 and A-57). Mr. Sawyer's testimony and, indeed, the very existence of these exhibits are totally inconsistent with appellant's claim (Rep. Tr. pp. 447-458).

Mrs. Kathryn Wheeler testified her grandfather had confirmed to her during his lifetime the purposes for creation of the trust (Rep. Tr. pp. 3519-3522 and 3535-3538).

It is respectfully submitted that the findings of fact criticized by appellant, far from being clearly erroneous, are supported by persuasive evidence as to the validity of the Indenture of Trust and its due acceptance by officers of The James Irvine Foundation in 1937. Any findings to the contrary would have to be based upon inference and speculation.

There is substantial evidence in the record which supports and makes eminently reasonable both the findings and conclusions of the court below. The contention of appellant these findings of fact are clearly erroneous is simply not warranted.

## CONCLUSION

The District Court's findings of fact are not "clearly erroneous" and, to the contrary, are "clearly correct". The judgment should be affirmed.

Respectfully submitted,

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